# Theempalenged Ouseph Thomas v Sarjit Singh Khaira

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 24–388 OF 2001–I
RICHARD MALANJUM J
26 JUNE 2002

***Administrative Law*** *— Remedies — Certiorari — Consequential relief — Whether court could award consequential relief*

***Civil Procedure*** *— Costs — Solicitor and client — Whether plaintiff was entitled to costs in subsequent civil suit — Whether defendant should pay plaintiff his costs as between solicitor and his client*

The plaintiff, an advocate and solicitor of the High Court of Sabah and Sarawak, was retained by the defendant to act for him in connection with his dismissal from the State Civil Service by the Sarawak State Public Service Commission in 1989. The retainer concerned an application for an order of certiorari. A warrant to act was executed and an agreed fee of RM25,000 was entered into between the parties. The defendant also agreed to pay for disbursements. In the interim, another civil suit, Civil Suit No KG 126 of 1989 ('civil suit'), was launched. No warrant to act was executed for that civil suit. It was the contention of the defendant that the subsequent civil suit was part and parcel of the application for an order of certiorari. It was the fee for the subsequent civil suit that was the heart of the dispute between the parties. The plaintiff applied for, inter alia: (i) a declaration that the plaintiff was entitled to costs of the civil suit; (ii) an order that the defendant pay the plaintiff his costs as between solicitor and his client in the matter of the said civil suit; and (iii) costs. The question was whether the professional fee paid by the defendant to the plaintiff in connection with the application for certiorari included the fee for the said civil suit.

**Held**, allowing the application and varying the orders:

(1) An examination of the warrant to act and the receipts issued for the instalment payments of the fee in respect of the application for an order of certiorari disclosed that it was made very clear that the fee of RM25,000 was meant for that application only. There was nothing to indicate that it was also for such other actions as might be taken while the plaintiff was retained as the solicitor for the defendant (see p 152C–D).

(2) The court could not accept that the defendant was ignorant of the manner or description of the fee that was paid to the plaintiff. The defendant would have been able to discern what was written in the receipts or at least enquired about their contents. In any event, the civil suit was for the benefit of the defendant without which he could not have claimed the items stated therein. The practice and the law then as regards an application for an order for certiorari

was that no ancillary relief could be added in such an application (see p 152D–F); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

**[Bahasa Malaysia summary**

Plaintif, seorang peguambela dan peguamcara di Mahkamah Tinggi di Sabah dan Sarawak, telah dilantik oleh defendan untuk bertindak bagi pihak beliau berhubung pemecatan beliau daripada Perkhidmatan Awam Negeri oleh Suruhanjaya Perkhidmatan Awam Negeri Sarawak pada 1980. Perlantikan (retainer) tersebut adalah berkenaan satu permohonan untuk satu perintah certiorari. Satu waran untuk bertindak telah dilaksanakan dan satu yuran yang telah dipersetujui berjumlah RM25,000 telah disempurnakan antara pihak-pihak tersebut. Defendan juga telah bersetuju untuk membayar wang pendahuluan tersebut. Sementara itu, satu guaman lain, Guaman Sivil No KG 126 tahun 1989 ('guaman sivil tersebut'), telah dimulakan. Tiada waran untuk bertindak telah dilaksanakan untuk guaman sivil tersebut. Adalah pendapat defendan bahawa guaman sivil yang berikutnya adalah sebahagian daripada permohonan untuk satu perintah untuk certiorari. Ia adalah yuran untuk guaman sivil berikut tersebut yang menjadi isu utama pertikaian antara pihak-pihak tersebut. Plaintif telah memohon untuk, antara lain: (i) satu deklarasi bahawa plaintif berhak mendapat kos untuk guaman sivil tersebut; (ii) satu perintah bahawa defendan membayar kepada plaintif kos beliau sebagai peguamcara dan anakguam beliau berhubung perkara dalam guaman sivil tersebut; dan (iii) kos. Persoalan yang ditanyakan adalah sama ada yuran profesional yang dibayar oleh defendan kepada plaintif berhubung dengan permohonan certiorari termasuk yuran untuk guaman sivil tersebut.

**Diputuskan**, membenarkan permohonan tersebut dan meminda perintah-perintah tersebut:

(1) Satu pemeriksaan berhubung waran untuk bertindak dan resit-resit yang dikeluarkan untuk pembayaran ansuran yuran tersebut berkaitan permohonan untuk satu perintah untuk certiorari telah mendedahkan dengan jelas bahawa yuran sebanyak RM25,000 tersebut adalah bagi maksud permohonan tersebut sahaja. Tiada apa-apa yang menunjukkan bahawa ia juga adalah untuk tindakan-tindakan lain yang mungkin dimulakan semasa plaintif dilantik sebagai peguamcara bagi pihak defendan (lihat ms 152C–D).

(2) Mahkamah tidak dapat menerima yang defendan tidak mengetahui tentang cara atau jenis yuran yang telah dibayar kepada plaintif. Defendan boleh menganggap apa yang tertulis di atas resit-resit tersebut atau sekurang-kurangnya bertanya tentang kandungannya. Dalam apa keadaanpun, guaman sivil tersebut membawa faedah kepada defendan kerana tanpanya beliau tidak

dapat menuntut butir-butir yang dinyatakan di dalamnya. Amalan dan undang-undang pada masa itu berhubung satu permohonan untuk satu perintah certiorari adalah di mana tiada relif sampingan yang boleh ditambah dalam permohonan sedemikian (lihat ms 152D–F); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.]

**Notes**

For cases on certiorari generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 135–306.

For cases on solicitor and client, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1794–1801.

**Cases referred to**

*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (folld)

*Sarjit Singh Khaira v The Government of the State of Sarawak & Anor* [1990] 2 MLJ 251 (refd)

*Theempalengad Ouseph Thomas* (*TO Thomas & Co*) representing himself as the plaintiff.

*Sarjit Singh Khaira* representing himself as the defendant.

**Richard Malanjum J**: On 26 June 2002, I allowed the application of the plaintiff and granted the following orders, namely:

(i) a declaration that the plaintiff is entitled to costs of Civil Suit No KG 126 of 1989 between *Sarjit Singh Khaira v Government of the State of Sarawak & Anor* (see [1990] 2 MLJ 251) from its inception in August 1989 until the 26 February 2001, taxed by the proper officer of court as between solicitor and own client but that such costs would include work done in interlocutory proceedings. Hence, the prayer 1 in encl 2 was therefore granted subject to the variation as ordered;

(ii) an order that the defendant do pay to the plaintiff his costs as between solicitor and his client in the matter of Civil Suit No KG 126 of 1989 in *Sarjit Singh Khaira* from its inception in August 1989 until the date on which the defendant served the plaintiff with his (defendant's) notice of intention of party to act in person, in place of solicitor, namely the 26 February 2001, taxed by the proper officer of the court as between solicitor and own client and subject to the limitation imposed in the foregoing order 1 granted to the plaintiff; and

(iii) costs.

I also stated that I would give my reasons in the event of an appeal. As there is now a notice of appeal filed, this is therefore my reasons.

By an originating summons dated 7 December 2001, the plaintiff sought for various relief in connection with his claim for legal fees from the defendant.

A It was supported by an affidavit of the plaintiff sworn to on 5 December 2001 (encl 2). Initially, there was judgment entered against the defendant as he failed to appear when the case came up for hearing on 3 April 2002. But the defendant applied to set aside that order contending that he was away at the material time and that he was not properly served. I allowed the application and set a date for the rehearing of the matter.

B The plaintiff is an Advocate and Solicitor of the High Court of Sabah and Sarawak practicing under the name and style of Messrs TO Thomas & Co in Kuching, Sarawak.

On 4 February 1989, the plaintiff was retained by the defendant to act for him in connection with his dismissal from the State Civil Service by the C Sarawak State Public Service Commission with effect from 1 January 1989. A warrant to act (exh A of encl 2) was therefore executed by the defendant for that purpose. And therein it was clearly stated the scope of the retainer, namely, an application for an order of certiorari. A sum of RM12,500 was also stated as having been paid as part payment of the agreed fee of RM25,000. The defendant also agreed to pay for the disbursements.

D The application for certiorari was therefore filed on 4 February 1989 praying for an order to quash the decision of the State Public Service Commission in dismissing the defendant. There was no dispute that no other prayer was sought for and that could be due to the position of the law on prerogative remedy at that time.

E Unfortunately, for the defendant, the application was dismissed by the High Court on the ground that it was filed two days after the prescribed period. An appeal to the then Supreme Court was also dismissed.

In the interim, another civil suit was launched wherein, inter alia, a declaration and arrears of salary and allowances plus compensation were F prayed for. It was not in dispute that there was no warrant to act executed for that case. It was the contention of the defendant that the subsequent action was part and parcel of the application for an order of certiorari. Indeed, it is the fee for this subsequent action that is the heart of the dispute between the parties herein.

As regards the application for an order of certiorari there was an G application made for an extension of time to file the same. That was granted on 1 September 1990. Thus, on 7 July 1995, the defendant successfully obtained an order of certiorari as prayed for earlier. There were appeals by the State Public Service Commission to the Court of Appeal and to the Federal Court but both were unsuccessful. For these appeals the defendant H signed warrants to act in favour of the plaintiff. However, it was obvious that the parties could no longer be in any form of relationship in that the plaintiff discharged himself to act for the defendant during the hearing of the appeal before the Federal Court. In any event, the appeal was dismissed by the Federal Court.

It was not denied by the defendant that he obtained no other relief in I connection with the application for an order of certiorari and even his plea before the Federal Court was not entertained preferring to say that such relief should be taken into consideration in Civil Suit No KG 126 of 1989.

But subsequently and before the hearing of the said civil suit, the defendant was paid the arrears of salary and allowances amounting to RM263,293.52.

As for the fate of the said Civil Suit No KG 126 of 1989, it is still pending for hearing and the defendant said that he is expecting the hearing to be completed by August 2002. He also said that there was an attempt to strike out the suit by the defendant therein but failed. An appeal to the then Supreme Court failed as well. It is, therefore, clear that the said civil suit has its own importance to the defendant and it was not an afterthought on the part of the plaintiff or a backup in the application for an order of certiorari. The question to ask therefore is whether the professional fee paid by the defendant to the plaintiff in connection with the application for an order of certiorari included the fee for the said civil suit.

An examination of the warrant to act and the receipts issued for the instalment payments of the fee in respect of the application for an order of certiorari disclosed that it was made very clear that the fee of RM25,000 was meant for that application only. There is nothing to indicate that it is also for such other actions as might be taken while the plaintiff was retained as the Solicitor for the defendant. Thus, I found no merit in the averment of the defendant.

It was also argued by the defendant that he was ignorant of the manner or description of the fee that was paid to the plaintiff. I could not accept that as the defendant is not an illiterate person having been in the civil service before. Surely, he would have been able to discern what was written in the receipts or at least enquired about their contents. And in any event the commencement of the said civil suit was for the benefit of the defendant in that without it he could not have claimed the items stated therein such as for the arrears of salary and allowances as well as for exemplary damages. The practice and indeed accepted as the law then as regards an application for an order for certiorari was that no ancillary relief could be added in such an application (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [19971] 1 MLJ 145).

Save for the assertion of the defendant that the fee of the said civil suit was part and parcel of the fee for the application for an order of certiorari it was not denied by the defendant that he had not made any payment for the same at any time to the plaintiff. And considering the fact that there was an application to strike out the action and an appeal to the apex court of the country, there must have been quite a lot of work done on the part of the plaintiff.

I did also consider the other points raised during the hearing but they failed to convince me to rule otherwise.

For the above reasons that I granted the orders as prayed for by the plaintiff with slight variations therein.

*Application allowed and orders varied.*

Reported by Zahid Taib